IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

PHILIP RAY WORKMAN	)	
	)	
Petitioner	)	No. 94-2577-M1/A
	)	
v.	)	**Capital Case**
	)	**Scheduled Execution Date:**
RICKY BELL, Warden	)	**September 24, 2003**
Riverbend Maximum Security	)	
Institution	)	
	)	
Respondent.	)	

MOTION FOR RELIEF FROM JUDGMENT

Pursuant to Fed.R.Civ.P. 60(b), Petitioner Philip Ray Workman respectfully moves this Court to grant him relief from its prior judgment denying habeas corpus relief. Specifically, this Court should grant relief from judgment on claims in the Petition For Writ of Habeas Corpus ¶¶117(d),[1] 117(f),[2] 120(a)(4),[3]120(d),[4] 134(f) & (g),[5] & 143[6] and order further proceedings and relief on such

[1] ¶117(d): The state withheld exculpatory evidence that Harold Davis did not witness Philip Workman shoot Lieutenant Oliver as it knowingly presented false testimony that precluded the jury from finding that Davis didn't see the shooting as he claimed.

[2] ¶117(f): The prosecution withheld exculpatory evidence about the circumstances surrounding the placement of a bullet on the crime scene as it presented Terry Willis' false testimony that he found the bullet.

[3] ¶120(a)(4): Trial counsel was ineffective for failing to investigate Harold Davis to establish that Harold Davis was lying when he claimed he witnessed Philip Workman shoot Lieutenant Oliver.

[4] ¶120(d): Trial counsel was ineffective for failing to investigate and present mitigating evidence at the sentencing phase of trial, including evidence of Philip Workman's tragic background.

[5] ¶134(f) & (g): Jury instructions at sentencing misled jurors about the need to be unanimous as to sentence and failed to inform jurors about the consequence of a failure to agree on sentence.

[6] ¶143: The death sentence does not satisfy the heightened standard of reliability required by the Eighth Amendment.

claims. As more fully detailed *infra*, this Court should grant the following relief:

(1) This Court should grant relief from judgment and reopen claims ¶¶117(d), 117(f), 120(a)(4) because this Court's prior judgment on those claims was tainted by official misconduct which affected the integrity of this Court's judgment. Specifically, this Court's prior judgment was unfairly tainted by:

(a) Harold Davis' and Terry Willis' state-sponsored perjury at trial;

(b) Official intimidation and threats of Harold Davis which prevented Davis from admitting his perjury; and

(c) Ongoing official failure throughout the habeas corpus proceedings to disclose exculpatory evidence showing Davis' perjury, Willis' perjury, and threats against Davis.

(2) This Court should grant relief from judgment on claim ¶120(d) because the intervening Supreme Court decision in Wiggins v. Smith, 539 U.S. ___, 123 S.Ct. 2527 (2003) establishes that this Court's prior judgment denying relief on this claim was improper;

(3) This Court should grant relief from judgment on claim ¶¶134(f) & (g) because the intervening decision of the United States Court of Appeals for the Sixth Circuit in Davis v. Mitchell 318 F.3d 682 (6th Cir. 2003) establishes that this Court's prior judgment denying relief on these claims was patently erroneous; and

(4) For all the individual reasons relief from judgment should be granted as to claims ¶¶117(d), 117(f), 120(a)(4), 120(d), and 134(f) & (g), and for all those reasons cumulatively, Philip Workman has been denied a reliable sentencing proceeding, and this Court should therefore grant relief from judgment on his claim ¶143 that his death sentence was unreliable.

This Court should grant Philip Workman's motion for relief from judgment.

INTRODUCTION

Philip Workman did not shoot Lieutenant Oliver. He is therefore innocent of capital murder and ineligible for the death penalty.

In habeas corpus proceedings before this Court, Workman sought a fair hearing and relief on claims that the prosecution unconstitutionally convicted him based upon false testimony from Harold Davis and Terry Willis. In his habeas petition, Philip Workman alleged that Harold Davis lied at trial when he claimed that he saw Workman shoot Oliver. He has also alleged that Terry Willis lied to the jury when he claimed that he found the bullet which supposedly killed Oliver. This Court denied relief.

It was not until 2001 – after this Court decided those claims against Philip Workman – that Workman first obtained sworn testimony that Davis had lied at trial. Similarly, in 2001, Workman first obtained sworn testimony that Davis had been threatened by police officers into sticking to his false trial testimony. Further, that same year, Workman first learned exculpatory proof previously withheld from him that Willis testified falsely when he claimed that he found a bullet from Workman's gun that allegedly killed Oliver. Testimony from a 2001 clemency proceeding makes clear that Willis never found any bullet at the crime scene.

Why did Davis – the only person who claimed to see the shooting – lie about seeing Workman shoot Oliver? And why did Willis – the person who claimed to find the supposed key piece of evidence against Workman – lie about finding a bullet from Workman's gun? And why did police witnesses threaten Harold Davis into sticking with his false testimony? The reason is clear. Philip Workman simply did not shoot Oliver. Oliver was killed by friendly fire. In fact, the unrefuted evidence from renowned forensic pathologist Dr. Cyril Wecht, M.D., is that Workman's ammunition

did not kill Oliver. It was only through the lies of Davis and Willis that the prosecution was able to convince the jury that Workman shot the fatal bullet and was therefore guilty of first-degree murder. In light of Dr. Wecht's proof and proof that Harold Davis lied, juror Wardie Parks – who voted to convict Workman of first-degree murder and sentence him to death – now categorically rejects the jury's verdict.

When this case was initially heard in this Court, Philip Workman was the victim of Davis' perjury and Willis' perjury, but unable to prove their perjury because state actors had threatened Davis and because state actors withheld evidence showing that Willis was lying as well. There can be no justice in a capital case when witnesses lie and the federal courts are unable to render a fair decision because state actors have manipulated the truth, misled jurors, threatened witnesses, and withheld evidence so as to influence the outcome of federal proceedings. That is exactly what has occurred here.

For that reason, Philip Workman is entitled to have this Court grant him relief from judgment based upon the misdeeds of state actors who sponsored false testimony at trial, threatened Davis into not recanting his false testimony, while at the same time knowing that the critical evidence from Terry Willis was likewise untrue. As a result, Philip Workman has been convicted on the basis of lies, when the forensic proof actually shows that he is innocent of first-degree murder under Tennessee law. Philip Workman's trial was unfair. The proceedings in this Court were unfair. This Court should intervene to prevent a miscarriage of justice. The motion for relief from judgment should be granted.

I.
STATEMENT OF FACTS

A.
LIEUTENANT OLIVER IS MORTALLY WOUNDED

After Philip Workman robbed a Wendy's restaurant after it closed at 10:00 p.m., he was confronted in the parking lot by Memphis Police Lieutenant Ronald Oliver. When Workman ran from Oliver, he tripped, fell, and offered his surrender. Police responded by striking Workman in the head with a hard object. Gunfire erupted in the chaos that followed. Oliver went down, mortally wounded by a bullet which struck him in the chest. The initial offense report makes clear that **officers** at the scene – plural – fired their weapons during the confrontation with Workman.[7]

B.
FOLLOWING THE INITIAL INVESTIGATION, NEW "EVIDENCE" EMERGES

After the shooting, police were apparently concerned that, in the fray, Oliver may have been hit by "friendly fire." Officer Wilson was dispatched to the morgue to take polaroid pictures of Lieutenant Oliver's wounds, which showed a single entrance wound to Lieutenant Oliver's left chest, and a smaller exit wound to his right back.[8] Wilson reported back to the station with the pictures. Another meeting was convened, and there was an "exchange of information."[9] After that "exchange of information," two new critical pieces of supposed "evidence" then emerged.

Remarkably, police logged those two claimed pieces of evidence at the very same minute

---

[7] "There on the Holiday Auto Parts lot there was an exchange of gunfire between the *officers* and the suspect. (There was) an exchange of gunfire between Officer Parker and the suspect."Doc. No. 67, Petitioner's Response To Respondent's Motion For Summary Judgment, Exhibit A at 027.

[8] Id., Exhibit A at 004; Id., Exhibit B at 375.

[9] Id., Exhibit A at 039.

– some 14 hours after the crime scene had been scoured the night before and all the witnesses at the scene interviewed. The first piece of new "evidence" was witness Harold Davis who mysteriously appeared, claiming that he saw the whole incident. On August 6, 1981, at 2:25 p.m., Davis purported to identify a photograph of Workman as a photograph of the man he supposedly saw shoot Lieutenant Oliver.[10] Davis claimed that he and his car were right in the middle of the Wendy's parking lot during the shooting, that he saw the whole scene unfold, and that he saw Workman shoot Oliver. Yet according to all the police reports concerning the crime scene and according to all witnesses who were at the scene, Davis and his car simply were not there.[11] The second piece of new "evidence" which also emerged was a nearly pristine bullet supposedly found by Terry Willis (an employee at the adjacent Holiday Auto Parts store) on the Auto Parts parking lot, in the middle of the crime scene which had been combed the night before. Exactly like Davis' statement, that bullet was logged as evidence at 2:25 p.m. The prosecution later claimed to the jury that Willis had recovered the bullet that killed Oliver.

C.
DAVIS & WILLIS TESTIFY AGAINST PHILIP WORKMAN AND WORKMAN GETS CONVICTED OF FIRST-DEGREE MURDER

Harold Davis was the prosecution's key eyewitness at Philip Workman's trial. His testimony was essential to Philip Workman's conviction and death sentence. At trial, Davis claimed that he had seen Workman shoot Oliver,[12] and the prosecution successfully argued for Workman's conviction

---

[10] Id., Exhibit A at 129.

[11] Id., Exhibit A at 36-46; Exhibit C; Exhibit E; Exhibit G; Trial Tr. 646, 695, 720.

[12] Trial Tr. 655-656, 664 (Davis claiming that Workman shot Oliver from a distance of "[n]o more than two or three feet at the most").

based upon Davis' purported view of the shooting: "[From] approximately two feet away is what I believe Mr. Davis said and a shot was fired. *He coolly and deliberately pulled this trigger and sent the bullet down this barrel and into the body of that man right there*.... [Workman has] been identified by Mr. Davis as being the shooter of Lt. Oliver."[13]

While Davis claimed to be the only eyewitness to the shooting, Terry Willis testified that he purportedly found the key piece of evidence in this case – Exhibit 35, the bullet that the state asserts was the bullet that killed Oliver, and that came from Workman's gun. Willis testified that he found the bullet on the parking lot the next day,[14] but on its face, Willis' story is not plausible. Despite the fact that the crime scene had been combed the night before, Willis claimed that he found Exhibit 35 in the parking lot the following morning, in a spot right in the middle of the crime scene. He claimed that he thought the bullet – which clearly looks only like a bullet – was a "ball bearing."[15] He claimed that he then took this used "ball bearing" inside and placed it in his toolbox.[16] But any mechanic would know that a used ball bearing is of no use. All of a sudden, Willis claimed, he thought that the "ball bearing" might have something to do with the shooting, so he called the police.[17] The state maintains that the bullet supposedly found by Willis was the bullet that killed Oliver.[18]

---

[13] Trial Tr. 1056-1057, 1065 (emphasis added).

[14] Trial Tr. 913-914.

[15] Id. at 913.

[16] Id. at 914.

[17] Id.

[18] In its opening statement, the state told the jury that it would "hold in your hand" the bullet that killed Oliver. Trial Tr. 496. In closing, hedged on this claim. Trial Tr. 1083. At a January 2001 clemency proceeding, Dr. O.C. Smith, the Shelby County Medical Examiner, reasserted that Exhibit

D.
WE NOW KNOW THAT DAVIS' AND WILLIS' TRIAL TESTIMONY WAS PERJURED

In habeas corpus proceedings, Philip Workman claimed that Davis and Willis lied at trial and that the state withheld evidence showing their perjury. Philip Workman, however, was unfairly thwarted in his ability to prove his case to this Court because of state misconduct.

1.
We Now Know That Davis Committed Perjury

During the course of prior proceedings in this Court, Harold Davis stuck to his story when contacted by defense counsel. An itinerant drug addict, Davis still maintained that he had seen Workman shoot Oliver. Though Philip Workman requested a hearing on his claims that Davis lied, this Court denied an evidentiary hearing, leaving Philip Workman unable to get sworn testimony from Davis. See R. 94 (District Court Opinion granting summary judgment).

Ultimately, Philip Workman was granted a hearing on a petition for writ of error coram nobis after the federal habeas corpus proceedings concluded. The state court proceedings related to (among other things) the falsity of Davis' testimony at trial.[19] Workman issued a subpoena to compel Harold Davis' attendance at the hearing, while simultaneously searching for Davis. Workman was unsuccessful in locating Davis, who remained itinerant.[20] The state, however, found Davis in a

35 was the bullet that killed Oliver.

[19] The coram nobis proceeding which occurred on June 27, 2001 will be cited as "June 27, 2001 CN Tr." The initial *coram nobis* hearing from August 13 & 14, 2001 is cited as "CN Tr. ___." The continuation of the *coram nobis* hearing on August 16, 2001 is cited as "Aug. 15, 2001 CN Tr. ___." The remainder of the hearing held on October 16, 2001 is cited as "Oct. 16, 2001 CN Tr. ___."

[20] June 27, 2001 CN.Tr.1-3.

Florida jail, but concealed his location from Workman and his attorneys.[21] The state arranged to have Davis brought to Memphis for a Monday hearing, once again concealing that fact from Workman.[22] It was only by happenstance that Davis' childhood minister saw Davis at the airport the day before the coram nobis hearing, the minister reported that information to Davis' sister, who relayed it to others, who eventually contacted Workman's attorney.[23]

Even though Davis was then going to appear at the hearing, the prosecution secreted Davis at the Germantown, Tennessee Jail.[24] As Davis later testified, he was held in a solitary cell, and while being held under those conditions, Davis thought about threats he had previously received from the police not to change his trial testimony.[25] As Davis explained, he was "scared out of his mind" at the jail as he reflected upon the threats that had been made against him and his family.[26]

The state's finding and concealing of Davis from Philip Workman – who had him under subpoena – has been described as "without a doubt the most contemptuous, egregious, disingenuous, chicanery that (I have) ever seen fostered upon the judiciary and upon the defendant ...."[27] The state's actions clearly indicate an attempt to manipulate Davis into testifying in a manner which would hurt Philip Workman. Indeed, there is no legitimate reason to hide a witness from a party who has

---

[21] CN Tr. 51.

[22] CN Tr. 100-101.

[23] CN Tr. 15.

[24] CN Tr. 55.

[25] CN Tr. 173, 351-355, 381-382.

[26] CN Tr. 355

[27] CN Tr. 18 (Frank Glankler, Esq.).

subpoenaed the witness. The prosecution's handling of Davis mirrors the very type of unfair manipulation of trial witnesses previously recognized by the Sixth Circuit in this case. See Workman v. Bell, 178 F.3d 759, 772 (6th Cir. 1998)(noting that police interfered with defense's ability to interview witness Steve Craig).

Nevertheless, finally under oath for the first time since 1982, and despite the threats against his life and his family, Harold Davis courageously admitted that he lied at trial when he claimed that he saw the shooting. To fully grasp the significance – and truth – of Davis' *coram nobis* testimony that he did not see Workman shoot Oliver, one need only look at his repeated assertions that he did not, in fact, see the fatal encounter. Harold Davis testified on no fewer than ten occasions that he did not see Workman shoot Oliver:

(1) At the beginning of his *coram nobis* testimony, Harold Davis emphatically stated that he did not see the struggle between Workman and the officer;[28]

(2) He emphasized that his statements in a 1999 videotape, in which he stated that he did not see the shooting, *were not a lie*;[29]

(3) He testified on more than one occasion that statements to authorities in 2001 that he saw the shooting were not true;[30]

(4) He said that what he said in 1982 was not true and was the product of

---

[28] CN Tr. 144.

[29] CN Tr. 149.

[30] CN Tr. 157, 177.

intimidation from persons who threatened him, those people being from the police;[31]

(5) He said that he didn't see what happened during the shooting;[32]

(6) He repeated that he did not see Workman shoot Oliver;[33]

(7) He again stated that his trial testimony was not true;[34]

(8) He again stated that his trial testimony was not true;[35]

(9) He again admitted that what he said at trial "wasn't true."[36]

(10) He emphasized in closing that *"I remember clearly that I did not see him.*"[37]

See generally Exhibit 1 (Excerpts Of Coram Nobis Testimony Of Harold Davis)(Attached). In sum, he fully recanted his trial testimony.[38] Davis' repeated assertions that he had not seen the shooting is evidence which a jury is entitled to consider when evaluating Philip Workman's guilt.

Davis did equivocate on some occasions during the hearing,[39] but he never backed away from his testimony that he had not seen the shooting. One must also remember that Davis' equivocation

---

[31] CN Tr. 172.

[32] CN Tr. 177.

[33] CN Tr. 344.

[34] CN Tr. 361.

[35] CN Tr. 364.

[36] CN Tr. 372.

[37] CN Tr. 396.

[38] CN Tr. 362-370.

[39] See e.g., CN Tr. 180.

occurred under three days of withering cross-examination which quite literally made his brain swell, and which required him to undergo emergency hospitalization.[40] Given his secret transport to Memphis, his being secreted in the Germantown Jail, the long-standing police threats against him, Davis' being "scared out of his mind,"[41] and the physical harm he was suffering while on the stand, it is understandable that Davis told the prosecutors what they wanted to hear. Davis was merely trying to ensure his own "self-preservation"[42] while "trying to survive" the ordeal.[43] And Davis' subsequent passing of a polygraph further establishes that his testimony at trial was, in fact, perjured.[44]

When this Court ruled on claims that Davis lied at trial, this Court believed that Davis' absence from the crime scene simply wasn't "plausible."[45] But not only is it plausible: It now clearly appears that Davis never saw the shooting. He himself has testified to this fact, he was threatened into not telling this truth, and all the other evidence proves it as well: Davis was not seen by any of the witnesses at the crime scene,[46] and his car was not there, as he claimed at trial.[47]

It is not Philip Workman's fault that Davis lied and that the truth was hidden from him.

---

[40] Aug. 15, 2001 CN Tr. 405.

[41] CN Tr. 355.

[42] CN Tr. 173, 179.

[43] CN Tr. 192, 195.

[44] See Exhibit 2 (Polygraph Report of Kenneth Vardell)(Attached).

[45] R. 94, p. 32 (District Court Opinion).

[46] R. 67, Petitioner's Response To Respondent's Motion For Summary Judgment, Exhibit C, Exhibit E, Exhibit G, Trial Tr. 646, 696, 720.

[47] Id., Exhibit A at 37-38, 42-43, 78-79.

Further, although this Court previously stated that Workman could not prove that the state knew the testimony was perjured, we now know from Davis' sworn testimony in 2001 that state officials knew it was perjured. Indeed, Davis' unrefuted testimony is that police officials threatened him not to tell the truth. It is only because Davis disregarded this threat that he finally (and courageously) told the truth: He never saw Workman shoot Oliver.

2.
We Now Know That Terry Willis Committed Perjury

We also now know that for the last 19 years – from the time of trial and throughout the course of prior proceedings in this Court – state officials had information (withheld from Workman) proving that Willis committed perjury at Philip Workman's trial. Specifically, Former Lieutenant Clyde Keenan stated at a 2001 clemency hearing that he – not Willis – found the bullet which supposedly killed Oliver (identified as Q1 by the F.B.I.) the night of the shooting.[48] This exculpatory information, however, appears nowhere in any report or documentation from Keenan immediately after the shooting, so Workman couldn't possibly have known this information until Keenan divulged it in 2001.

But Keenan's statement makes one thing clear: Willis lied at trial, and state officials knew that. Willis' lie is apparent. If Keenan found the bullet, Willis could not have done so, and Willis' testimony at trial was perjury. Yet the information that Willis did not find any bullet was not divulged to Workman, and only surfaced days before a scheduled execution date in 2001, long after the proceedings in this Court had concluded.

Moreover, previously unavailable digital enhancement of a crime scene photo indicates that there is an evidence cup (turned upside down) on the parking lot near the curb between Wendy's and the Holiday Auto Parts Lot. See Exhibit 4 (crime scene photo and digitally enhanced crime scene photo)(Attached). That evidence cup and the item marked by it, however, appear *nowhere* in the crime scene diagram.[49] It thus appears that that item at the crime scene marks the location of a bullet

---

[48] Jan. 26, 2001 Clemency Proceeding, pp. 275-278 (Attached as Exhibit 3).

[49] R. 67, Petitioner's Response To Respondent's Motion For Summary Judgment, Exhibit B, p. 12.

– not Workman's – which struck Oliver and caused his mortal wound. Why else would the crime scene diagram omit such a crucial piece of evidence?[50]

E.
THE EFFECT OF THE PERJURY: WORKMAN HAS BEEN UNJUSTLY CONVICTED

The evidence proves that Davis has lied. The evidence proves that Willis has lied. The result of such perjury has been that Philip Workman has been unjustly convicted and faces execution despite the fact that the unrefuted forensic proof is that Workman did not shoot Oliver. This fact makes Philip Workman actually innocent of first-degree murder. State v. Severs, 759 S.W.2d 935, 938 (Tenn.Crim.App. 1988)(to be guilty of first-degree murder, lethal force must actually emanate from defendant). See Workman v. State, 41 S.W.3d 100, 101 n.1 (Tenn. 2001).

Indeed, at the 2001 *coram nobis* proceeding, Workman presented the unrefuted testimony of eminent forensic pathologist Dr. Cyril Wecht. Dr. Wecht testified unequivocally that the bullet that killed Lieutenant Oliver did not come from Philip Workman's gun.[51] Dr. Wecht based his opinion on the facts that (1) the bullets in Workman's gun were .45 caliber aluminum-coated hollow-point bullets, (2) such bullets expand when they strike a body, (3) because they expand, they do not exit once they penetrate a body, (4) Dr. Wecht had never seen a bullet such as Workman's exit a body, and (5) the bullet that killed Lieutenant Oliver exited his body, leaving an exit wound smaller

---

[50] Further proof suggests that a critical piece of evidence was withheld. The crime scene diagram specifically omits an item (13) which is surrounded in the listing of items by all four (4) cartridge casings recovered at the scene (9, 10, 11, 12) and bullet fragments found at the scene (14, 15, 16). Id. With all the cartridge casings being accounted for on the list, the omitted or "missing" item, therefore, appears to be a bullet. An item found at the scene mysteriously disappeared, while a new bullet mysteriously appeared the next day through Terry Willis.

[51] Oct. 16 CN Tr. 23, 136-37.

than the entrance wound.[52] Dr. Wecht's testimony proves that Philip Workman did not shoot Oliver and therefore is actually innocent of the first-degree murder of Lieutenant Oliver.

Like Davis' new sworn testimony, Dr. Wecht's proof is critical. Having heard the testimony of Dr. Wecht and Harold Davis at the *coram nobis* proceeding, Wardie Parks – one of the jurors who convicted Philip Workman – sought to testify that he would never have convicted Workman had he heard Dr. Wecht's proof and the truthful testimony of Davis that he had not seen Workman shoot Oliver.[53] The state courts, however, refused to consider Wardie Parks' testimony, invoking Tenn.R.Evid. 606(b). But Wardie Parks is unwavering: He never would have convicted Philip Workman had he known the truth.[54] And despite the fact that Dr. Wecht's testimony was unrefuted at the *coram nobis* hearing and there has never been any contrary proof presented by the prosecution in any court of law, Philip Workman has been denied relief in the state courts.

II.
PHILIP WORKMAN IS ENTITLED TO RELIEF FROM JUDGMENT BASED UPON INTERVENING EVENTS SINCE THIS COURT'S PRIOR CONSIDERATION OF THIS CASE

Under the circumstances presented here, Philip Workman is entitled to relief from judgment under Fed.R.Civ.P. 60(b), because he was denied fair proceedings in this Court as a result of state misconduct, and because of intervening legal developments, specifically the Supreme Court's recent decision in Wiggins v. Smith, 539 U.S. ___ (2003) and the Sixth Circuit's intervening decision in Davis v. Mitchell, 318 F.3d 682 (6th Cir. 2003).

---

[52] Id. at 19-25.

[53] See Oct. 16, 2001 CN Tr. 29, 40.

[54] Id.

A.
RELIEF IS AVAILABLE UNDER FED.R.CIV.P.60(b) WHEN A PETITIONER HAS BEEN DENIED A FULL AND FAIR HABEAS CORPUS PROCEEDING

Fed. R.Civ.P. 60(b) provides that a United States District Court may grant relief from a final judgment for:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Fed.R.Civ.P. 60(b).

"In simple English," Rule 60(b) vests power in courts "adequate to enable them to vacate judgments *whenever such action is appropriate to accomplish justice*." Klaprott v. United States, 335 U.S. 601, 615, 69 S.Ct. 384, 390 (1949)(emphasis supplied). The Rule is "simply the recitation of pre-existing judicial power" to set aside judgments which are unfair. Plaut v. Spendthrift Farm Inc., 514 U.S. 211, 234-235 (1995). "Rule 60(b) . . . reflects and confirms the courts' own inherent and discretionary power, 'firmly established in English practice long before the foundation of our Republic,' to set aside a judgment whose enforcement would work inequity." Plaut v. Spendthrift Farm, Inc., 514 U.S. at 233-234, quoting Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 244 (1944).

Although the Sixth Circuit has held in McQueen v. Scroggy, 99 F.3d 1302, 1335 (6th Cir. 1996) that "We agree with those circuits that have held that a Rule 60(b) motion is the practical equivalent of a successive habeas corpus petition," (citing cases), Petitioner respectfully submits that

McQueen does not foreclose the use of 60(b) to reopen habeas corpus proceedings. Rather, 60(b) must be an available remedy when proceedings before the United States District Court have been tainted by misconduct and/or where intervening legal developments establish that a District Court's habeas judgment is erroneous.

Justice Stevens agrees. As he has explained, a Rule 60(b) motion is proper when the petitioner does not "purport to set forth the basis for a second or successive challenge to the state-court judgment of conviction," but instead "seek[s] relief from the final order entered by the federal court in the habeas proceeding." Abdur'Rahman v. Bell, 537 U.S. 88, 96, 123 S.Ct. 594, 598 (2002) (Stevens, J., dissenting).

Other courts of appeals agree that motions under Rule 60(b) are permissible when there has been unfairness in the process leading to the entry of the federal habeas judgment. See e.g., Rodriguez v. Mitchell, 252 F.3d 191, 199 (2d Cir. 2001)(considering 60(b) motion in habeas case based on allegations of unfairness in federal habeas proceedings: "[A] motion under Rule 60(b) to vacate a judgment denying habeas is not a second or successive habeas petition and should therefore be treated as any other motion under Rule 60(b)."); Shortt v. Roe, 64 Fed.Appx. 655 (9th Cir. 2003)(Rule 60(b) motion not a second or successive application for habeas corpus relief if it does not "challenge the integrity of the state criminal trial but rather challenge[s] the integrity of the federal habeas proceeding." See also Banks v. United States, 167 F.3d 1082, 1083 (7th Cir. 1999) ("allegations seriously challenging the integrity of [a] first habeas proceeding" proper basis for relief from judgment under Rule 60(b)).

As the Second Circuit explained in *Rodriguez*, Rule 60(b) is designed to remedy unfairness in the *federal habeas proceedings*, not to allow a second challenge to the underlying *state court*

proceedings. A proper Rule 60(b) motion thus involves allegations that the ultimate judgment of the federal district court was distorted because of some error or unfairness in the federal court process. It is for this reason that Rule 60(b) specifically allows for relief for errors in the process leading to the entry of the federal judgment. Rodriguez v. Mitchell, 252 F.3d at 199.

Importantly, as a matter of policy, this interpretation of Rule 60(b) is necessary to allow federal courts to vindicate justice in habeas cases. It is not fair or equitable to allow state actors to interfere with a petitioner's and the court's ability to fully and fairly decide a habeas claim, but then require a petitioner to satisfy the heightened standards for second petitions only because evidence of misconduct or unfairness arises after the district court has rendered its judgment. It would be patently unfair to allow such abuse of the judicial process, as has occurred here. Especially where Philip Workman's life is at stake, Rule 60(b) provides this Court ample power to remedy the inequity that has occurred in the proceedings before this Court. This Court must therefore consider the 60(b) motion and grant relief.[55]

B.
PHILIP WORKMAN IS ENTITLED TO RELIEF FROM JUDGMENT ON HIS CLAIMS THAT THE PROSECUTION WITHHELD EVIDENCE AND PRESENTED FALSE TESTIMONY, AND COUNSEL WAS INEFFECTIVE

In his petition for writ of habeas corpus, Philip Workman has alleged that the prosecution knowingly presented false testimony from Harold Davis and Terry Willis, and withheld exculpatory

[55] By filing this motion for relief from judgment pursuant to Fed.R.Civ.P. 60(b), Philip Workman expressly does not file a second or successive petition for habeas corpus relief. He objects to any potential recharacterization of his motion as an second or successive application for habeas corpus relief.

evidence showing the falsity of their testimony.[56] He has also alleged that counsel was ineffective for failing to investigate Davis' story to show its falsity,[57] and that the death sentence was unreliable.[58]

When rejecting Philip Workman's claims of false testimony, this Court did not believe that either Davis' testimony or Willis' testimony was perjured or that the prosecution had knowingly presented false testimony. At that time, however, neither Philip Workman nor this Court was aware of key facts which had been withheld by state agents. Those critical facts included:

(1) Davis' and Willis' testimony was, in fact, false (See *supra*, pp. 5-14);

(2) After the trial, Davis had been threatened by state agents into withholding the truth that he had not seen the shooting of Lieutenant Oliver (See CN Tr.172, pp. 11-12, *supra*); and

(3) Clyde Keenan has stated that he (not Willis) found the bullet that the prosecution claimed to be the fatal bullet (See p. 13, *supra*).

With the prosecution and state agents having withheld this exculpatory evidence, Philip Workman was denied a fair consideration of his habeas petition in this Court, and he is entitled to relief from judgment. Both he and this Court were the victims of an ongoing deception and fraud which tainted the fairness of this Court's habeas proceedings.

Indeed, the state's duty to disclose exculpatory evidence is ongoing, and requires disclosure of exculpatory evidence not only for trial, but afterwards as well, including throughout the habeas

---

[56] See Petition For Writ Of Habeas Corpus, ¶¶ 117(d), 117(f).

[57] Id., ¶120(a)(4).

[58] Id., ¶143.

proceedings in this Court. As the Supreme Court has explained, the prosecution has a duty to disclose material exculpatory evidence and "the duty to disclose is ongoing." Pennsylvania v. Ritchie, 480 U.S. 39, 60, 107 S.Ct. 989, 1003 (1987)(remanding for determination of existence of exculpatory evidence).

As the Tenth Circuit has explained:

> We . . . agree, and the State concedes, that the duty to disclose is ongoing and extends to *all stages of the judicial process*.

Smith v. Roberts, 115 F.3d 818, 820(10th Cir. 1997)(emphasis supplied)(exculpatory evidence not disclosed until after trial), citing Pennsylvania v. Ritchie, 480 U.S. 39 at 60. The duty fully includes the mandate that the state disclose exculpatory evidence during the course of federal habeas corpus proceedings. Thomas v. Goldsmith, 979 F.2d 746, 749-750 (9th Cir. 1992)(state has a "duty to turn over exculpatory evidence at trial, but . . . [also a] present duty to turn over exculpatory evidence relevant to the instant habeas corpus proceeding.") See Thompson v. Calderon, 151 F.3d 918, 935 n. 12 (9th Cir. 1998)(Reinhardt, J., concurring and dissenting)("The *Brady* duty is an ongoing one, and continued to bind the prosecution throughout . . . habeas proceedings."); See also Monroe v. Blackburn, 748 F.2d 958, 960 (5th Cir. 1984)(addressing claim that post-conviction suppression of evidence violated due process).[59]

The state, however, violated that ongoing duty of disclosure during the habeas corpus proceedings in this Court. It is deceptive and fraudulent to fail to provide exculpatory evidence when

[59] As a matter of policy, this only makes sense. Should the prosecutor and police be able to withhold evidence until after trial, they can avoid their *Brady* obligations by simply ignoring them. That cannot be the law, as it would preclude the enforcement of the prosecution's *Brady* obligations, and the prosecutor's ethical obligations to ensure that justice is done. This requires disclosure of material exculpatory evidence whenever it exists and wherever it is found.

such evidence exists, and when one is under a duty to disclose that evidence. Here, though state agents knew that Davis had been threatened into silence about his perjury, that information was not provided to Philip Workman or his attorneys. Those threats against Davis – which were criminal in nature (See 18 U.S.C. §1512(b)(1) & (b)(2)(witness intimidation statute)) – prevented a full and fair consideration of Philip Workman's claims in this Court. They led this Court to erroneously believe that Davis' testimony was not false, and that the state had no knowledge of the false testimony.[60]

The threats against Davis, however, actually prove both points on which this Court found the proof lacking. Indeed, the threats against Davis conclusively prove both that Davis' testimony at trial was false, and the state knew it was false. The very reason for the threats was to keep Davis from revealing that he lied at trial, and the mere act of threatening Davis conclusively demonstrates that the state knew Davis' trial testimony was false. Because of these threats, Philip Workman did not receive a fair hearing on his claims, and relief from judgment is therefore warranted under Fed.R.Civ.P. 60(b) on Petition ¶¶117(d) & 120(a)(4), related to the false testimony of Harold Davis. This is precisely the type of situation in which the federal courts retain the power to grant relief from judgment under Fed.R.Civ.P. 60(b).

Similarly, when this Court denied relief on Philip Workman's claim that the prosecution presented false testimony from Terry Willis and withheld exculpatory evidence showing the falsity of his testimony there was a piece of evidence that did not yet exist: Clyde Keenan's 2001 statement that Keenan – not Willis – recovered the bullet claimed to be the fatal bullet.

All in all, Clyde Keenan's statement about the finding of the bullet makes clear two points:

---

[60] See R. 94, pp. 31-32 (District Court Opinion).

(1) Willis was lying at trial; and (2) state agents (including Keenan and/or others, especially those who were at the crime scene) knew that Willis' testimony was false. Without this critical evidence during the habeas proceedings, however, Philip Workman was unable to prove his claim, and this Court denied his claim for relief. The withholding of Keenan's statement and other officers' knowledge of the crime scene rendered the proceedings in this Court unfair. Such evidence was improperly withheld from Philip Workman and this Court, but critical to this Court's decision on Petition ¶117(f). Accordingly, under Rule 60(b), this Court may properly grant the motion for relief from judgment and order further proceedings on ¶117(f) related to the false testimony of Willis.

Even more fundamentally, Philip Workman has been the victim of state-sponsored perjury at trial which has remained unrectified for two decades. The state knew that Davis and Willis perjured themselves but the state withheld evidence showing that perjury. The intrinsic harm from the perjury has carried throughout the federal habeas process, and has caused harm which remains unrectified by this Court to this day. The mere existence of Davis' and Willis' perjury establishes the type of circumstance for which 60(b) relief was designed, because that perjury has distorted the processes of this Court, leaving Philip Workman without the remedy to which he is justly entitled. The mere existence of perjury at trial – attributable to the state, not Workman – requires that this Court grant relief from judgment on Petition ¶¶117(d), 117(f), & 120(a)(4).

Just as Philip Workman is entitled to relief from judgment in light of new evidence showing that the state deprived him of a fair habeas hearing on claims ¶¶ 117(d), 117(f) & 120(a)(4), that same evidence further demonstrates the validity of Philip Workman's additional claim – previously denied by this Court – that the death sentence was unreliable. Petition For Writ Of Habeas Corpus, ¶143. The fact that the death sentence was imposed by jurors based upon the false testimony of Davis

and Willis establishes that the death sentence was unreliable. See e.g., Mitchell v. Gibson, 262 F.3d 1036, 1060-1066 (10th Cir. 2001)(death sentence vacated as unreliable where sentence based upon false testimony concerning circumstances of the offense and state withheld evidence showing falsity of its case).

The unreliability of the death sentence is apparent when one considers that Philip Workman would not have been sentenced to death under Tennessee law if only one juror had voted for life. See Carter v. Bell, 218 F.3d 581, 592 (6th Cir. 2000)(death sentence must be reversed where, absent constitutional error, "at least one juror could have found [the defendant] did not deserve the death penalty."); See Brown v. Rowland, 206 F.3d 988 (10th Cir. 2000)(granting habeas relief and ordering new sentencing hearing where jury relied on unconstitutional statement because "it would have taken only a single juror to preclude the imposition of the death sentence.") Especially where Juror Wardie Parks has repudiated the verdict of conviction and the death sentence in light of Harold Davis' new testimony (See pp. 16-17, *supra*), it is clear that the death sentence is unreliable. Accordingly, this Court should grant relief from judgment on Petition ¶143.[61]

C.
PHILIP WORKMAN IS ENTITLED TO RELIEF FROM JUDGMENT GIVEN INTERVENING DECISIONS OF THE SUPREME COURT AND THE SIXTH CIRCUIT

1.
Rule 60(b) Provides A Basis For Relief In Light Of Intervening Legal Decisions Which Demonstrate That A District Court Judgment Is Erroneous

Rule 60(b) may also be used to grant relief from judgment in a habeas proceeding when

[61] As noted *infra*, the death sentence is also unreliable given counsel's ineffective failure to investigate and present mitigating evidence, and given improper jury instructions. Each of these reasons individually and cumulatively warrant relief from judgment on Petition ¶143.

intervening appellate decisions establish the error in the prior federal court judgment. See e.g., Overbee v. Van Waters, 765 F.2d 578, 580-581 (6th Cir. 1985)(granting relief from judgment in light of intervening court decision); Adams v. Merrill Lynch Pierce Fenner & Smith, 888 F.2d 696, 702 (10th Cir. 1989)(change in relevant case law by Supreme Court warrants relief under Rule 60(b)(6)). It is "particularly appropriate" to employ Rule 60(b)(6) when intervening legal developments call into question the validity of the habeas judgment – whether in favor of the petitioner or the state. See Cornell v. Nix, 119 F.3d 1329, 1332 (8th Cir. 1997); Matarese v. LeFevre, 801 F.2d 98, 106 (2d Cir. 1986); Ritter v. Smith, 811 F.2d 1398 (11th Cir. 1987).

Thus, for example, an intervening decision favorable to the state has been used to reverse a judgment granting habeas relief, when the prior grant of relief was based on an erroneous legal premise. See Ritter v. Smith, 811 F.2d 1398 (11th Cir. 1987)(based on intervening court decision, granting state's Rule 60(b) motion and denying habeas relief after petitioner had secured relief on appeal and state's certiorari petition had been denied). On the other hand, however, district courts have granted relief from judgments denying habeas relief where intervening legal developments establish that a district court's prior judgment denying habeas corpus relief was in error. See e.g., Henderson v. Collins, No. C1-94-106 (S.D.Ohio Jul. 10, 2003)(Exhibit 5)(Attached)(granting 60(b) relief in death penalty case following intervening Sixth Circuit decision in Davis v. Mitchell, 318 F.3d 682 (6th Cir. 2003); Reinoso v. Artuz, 1999 U.S.Dist.Lexis 7768 (S.D.N.Y. 1999)(granting rule 60(b)(6) motion and reinstating habeas petition where intervening Second Circuit decision in Ross v. Artuz, 150 F.3d 97 (2d Cir. 1998) which in effect overruled prior decision in Peterson v. Demskie, 107 F.3d 92 (2d Cir. 1997) upon which district court relied in initially denying relief).

In this case, there are two intervening decisions which call into grave doubt the correctness

of this Court's prior judgment denying habeas corpus relief: Wiggins v. Smith, 539 U.S. ___, 123 S.Ct. 2527 (2003), and Davis v. Mitchell, 318 F.3d 682 (6th Cir. 2003). As a result, this Court should grant the motion for relief from judgment – especially since this is a capital case in which Philip Workman has a fundamental right to life, and the state has no interest in executing a death sentence obtained in violation of law.

2.
PHILIP WORKMAN IS ENTITLED TO RELIEF FROM JUDGMENT IN LIGHT OF Wiggins v. Smith, 539 U.S. ___, 123 S.Ct. 2527 (2003)

This Court should grant relief from judgment on Petition ¶120(d) in light of the Supreme Court's intervening decision in Wiggins v. Smith, 539 U.S. ___ (2003), in which the Supreme Court granted habeas corpus relief for trial counsel's ineffectiveness in failing to investigate and present mitigating evidence at a capital sentencing hearing. A review of the record in light of Wiggins confirms that this Court's prior denial of relief on Philip Workman's ineffectiveness claim was improper. Given this intervening law from the United States Supreme Court, this Court should grant the motion for relief from judgment.

Before this Court, Philip Workman has alleged that counsel was ineffective for failing to investigate and present any mitigating evidence in support of a life sentence, including proof that, as a child, Philip Workman suffered horrible abuse and neglect which ultimately led him to turn to drugs, to which he became addicted, and which led him to rob the Wendy's.[62] Philip Workman specifically maintained that counsel was ineffective because they failed to conduct a thorough social

[62] See generally R. 67, Petitioner's Response To Respondent's Motion For Summary Judgment, Exhibit L, Declaration of Ann-Marie Charvat, Ph.D.; Petition ¶120(d).

history investigation of Philip Workman's life.[63]

While the Sixth Circuit has acknowledged that Workman has "very compelling mitigating evidence," Workman v. Bell, 178 F.3d 759, 770 (6th Cir. 1998), this Court has similarly noted the "substantial evidence indicating a diminished capacity and tragic family background."[64] Nevertheless, both this Court and the Sixth Circuit have denied relief after reaching the conclusion that Workman's attorneys did not fail to reasonably investigate this compelling mitigating evidence. Id. at 770-771; R. 94, District Court Opinion, p. 48. The Supreme Court's intervening decision in Wiggins, however, calls this Court's prior conclusion into grave doubt.

Indeed, as the Supreme Court explained in Wiggins, when counsel has failed to investigate mitigating evidence, defense counsel's "Decision not to investigate . . . must be directly assessed for reasonableness under the circumstances." Wiggins, 539 U.S. at ___, 123 S.Ct. at 2541 (citation omitted). Any failure to investigate is not reasonable if it is "the result of inattention, not reasoned strategic judgment." Id., 539 U.S. at ___, 123 S.Ct. at 2542.

Importantly, as the Court explained in Wiggins, it is imperative that counsel conduct a reasonable social history investigation into the client's background and circumstances. Id., 539 U.S. at ___, 123 S.Ct. at 2536 (noting that professional standards required preparation of social history report). In fact, "failure to prepare a social history [does] not meet the minimum standards of the profession" in a capital case. Id., 539 U.S. at ___, 123 S.Ct. at 2538, quoting Wiggins v. State, 352 Md. at 609. Indeed, as of 1980, the Sixth Amendment has demanded that:

---

[63] R. 67, Petitioner's Response To Respondent's Motion For Summary Judgment, Exhibit M, Declaration of Gillian Blair, Ph.D.

[64] R. 94, District Court Opinion, p. 47.

> trial counsel . . . fulfill their obligation to conduct a ***thorough investigation*** *of the defendant's background.*

Williams v. Taylor, 529 U.S. 362, 396, 120 S.Ct. 1495, 1515 (2000)(emphasis supplied)(citing 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed. 1980)).As shown *infra*, counsel here, however, did not conduct that "thorough investigation" demanded by the Sixth Amendment.

Wiggins also makes clear that defense counsel performs deficiently if he or she fails to conduct that thorough social history investigation and provide that information to psychological experts. Id. (psychologist conducted and completed evaluation without a social history). And indeed, counsel here knew well that such a detailed social history of Philip Workman's life was needed – especially to provide such information to any expert witnesses, including Dr. Allen Battle, Ph.D.[65]

Yet when Dr. Battle evaluated Philip Workman, his billing record and report indicate two stunning facts: (1) Battle only spent maybe *an hour* trying to evaluate Philip Workman's entire life and psychological makeup;[66] and (2) aside from information about Workman's history of drug use which Workman provided him, Battle knew *nothing* of Workman's social history which provides the explanation why Workman turned into a drug addict who ultimately robbed the Wendy's – that

---

[65] See R. 67, Petitioner's Response To Respondent's Motion For Summary Judgment, Exhibit B, p. 86 (defense counsel's notes acknowledging need to prepare social history for psychological evaluation); Id., p. 354 (defense counsel's notes of need to "gather all the information you have on [Workman's] background and drug use and give it to Battle before he begins the exam.").

[66] See R. 67, Petitioner's Response To Motion For Summary Judgment, Exhibit B, p. 497 (Battle charged Public Defender's Office $175 for two separate evaluations, including one of Workman and another of Larry Ransom).

evidence is the tragic family history and history of abuse contained in Dr. Charvat's declaration.[67] That social history includes proof of:

(1) The unstable marriage of Philip's parents;

(2) Philip's abandonment by his mother when he was a child;

(3) Philip's living in extreme poverty as a child;

(4) Philip's living in the violent home of his grandparents after being placed into their custody;

(5) Philip witnessing the horrifying incident of his brother David being shot;

(6) The academic difficulties experienced by Philip as a child;

(7) Philip's running away from home to avoid the abuse and chaos present there;

(8) Philip's incarceration with the Texas Youth Council (Gatesville), during which Philip was physically abused and treated with mental cruelty;

(9) Philip's turning to drugs, including intravenous cocaine, following his release from Gatesville and his joining the military, and his growing out-of control addiction at the time he robbed the Wendy's.[68]

Having lacked Philip Workman's social history and having spent a mere hour or so considering

---

[67] And, indeed, there is little question that Dr. Battle knew none of this information, having charged defense counsel a mere $175 for his services (See Petitioner's Response To Motion For Summary Judgment, Ex. B, p. 497), which clearly shows that Battle only spent maybe an hour on Workman's case.

[68] See R. 67, Declaration of Ann-Marie Charvat, Ph.D., Petitioner's Response To Motion For Summary Judgment, Exhibit L.

Workman's case, it is understandable that Dr. Battle was not called to provide mitigating evidence at sentencing – he was in no position to do so, given his cursory examination of Workman's life and the lack of social history provided to him by counsel.

Moreover, there was simply no excuse for defense counsel's failure to investigate and present to the jury the compelling mitigating evidence that Workman has presented to this Court. Indeed, Dr. Charvat's declaration is based upon her interviews with Terry Workman (Philip's brother), Rose Workman (Philip's stepmother), and Philip; as well as records of Philip from public school, Gatesville, the military, and medical institutions. And in fact, Philip provided much of the information in Dr. Charvat's report to defense counsel during an August 20, 1981 interview.[69] It is therefore inexplicable why counsel failed to further investigate this evidence and then present it to the jury as mitigating evidence at sentencing – especially where counsel told the jury that counsel was going to present mitigating evidence. See Workman v. Bell, 178 F.3d at 770 (defense counsel promised the jury that he would present mitigating evidence but then completely failed to do so).

In rejecting Philip Workman's ineffectiveness claim relating to Workman's tragic background, abuse, and family circumstances, this Court stated that counsel was not ineffective for several reasons, none of which withstand scrutiny under Wiggins:

> (1) First, this Court stated that counsel acted reasonably because they had sought two mental health exams (R. 94, District Court Opinion, p. 50). Wiggins makes clear that a bare mental health evaluation is not sufficient to satisfy the Sixth Amendment's guarantee of effective performance. Indeed, contrary to this

[69] See Petitioner's Response To Motion For Summary Judgment, Exhibit B, Aug. 20, 1981 25-Page Interview Of Philip Workman.

Court's ruling, Wiggins was granted relief despite the fact that his counsel hired a psychologist. Rather, as Wiggins now makes clear, when, as here, counsel fails to provide a mental health expert with a complete social history, counsel's performance is constitutionally deficient. Exactly as in Wiggins, both of the "exams" involving Philip Workman were woefully inadequate because counsel pursued such exams without first doing what is constitutionally-required – obtaining and providing the type of social history obtained by Dr. Charvat. Indeed, Dr. Ben Bursten briefly examined[70] Philip Workman on August 8, 1981 (two days after the offense), at a point in time when no social history investigation had been initiated. Dr. Bursten therefore had no social history. Dr. Battle's similar approximate 1-hour "evaluation" of Workman (noted *supra*) suffered that same fatal flaw, as it did not include the critical social history information contained in Dr. Charvat's declaration, even though such social history was clearly available to counsel. As Wiggins establishes, defense counsel does not act reasonably in having (at most) two hours of inadequate "evaluation" conducted in the absence of a complete social history. Wiggins makes it eminently clear that under such circumstances, counsel has not acted reasonably. Wiggins makes clear that, contrary to this Court's earlier conclusion, counsel's performance here was constitutionally deficient .

(2) Second, in originally denying relief, this Court stated that Philip

[70] Dr. Bursten charged the Public Defender's Office $180 for his visit with Philip Workman (See R. 67, Petitioner's Response To Motion For Summary Judgment, Exhibit B, p. 493), which indicates that like Dr. Battle, Dr. Bursten spent at most an hour in "evaluating" Workman, which can in no sense be considered a thorough psychological examination.

Workman never advised counsel of the abuse he suffered, about seeing his brother David being shot, or about the cruelty and abuse he suffered in Gatesville (R. 94, District Court Opinion, p. 50 & n. 31). As Wiggins makes clear, however, once counsel has leads concerning mitigating aspects of a defendant's background, counsel are duty-bound to "expand their investigation" to find additional mitigating evidence related to the evidence already in counsel's possession. See Wiggins, 539 U.S. at ___, 123 S.Ct. at 2536 (where counsel had two documents containing mitigating evidence, counsel acted unreasonably in failing to conduct further investigation arising from those documents). Here, from counsel's interview with Philip Workman, counsel knew of Workman's troubled family history. Counsel, however, failed to fully probe that history, when further investigation would have uncovered the abuse presented to this Court. Counsel had David Workman's phone number[71] but neglected to obtain from him proof that Philip witnessed violence against David and experienced violence within the family. Counsel also failed to call him as a witness. Moreover, though counsel knew that Philip was incarcerated in Gatesville, counsel failed to either obtain Philip's Gatesville records (none are contained in counsel's file) or research the well-documented horrors of Gatesville – which were well-known and readily available to counsel. See Morales v. Turman, 383 F.Supp. 53, 77 (E.D.Tex. 1974)("Schools under the jurisdiction of the TYC [Texas Youth Council] have been the scenes of widespread physical and psychological brutality."); Morales

[71] See Petitioner's Response To Motion For Summary Judgment, Exhibit B, Dec. 17, 1981 Memo to Robert Jones & Edward Thompson.

v. Turman, 364 F.Supp. 166 (E.D.Tex. 1973). Each of these failures was unreasonable under Wiggins: Each was "the result of inattention, not reasoned strategic judgment." Id., 539 U.S. at ___, 123 S.Ct. at 2542.

(3) Third, when originally denying relief, this Court also stated that counsel was not ineffective because counsel had interviewed some family members.[72] Much of the mitigating evidence contained in Dr. Charvat's declaration comes from Terry Workman. Counsel had his phone number[73] but never obtained from him the compelling mitigating evidence later secured by Dr. Charvat.[74] Counsel's failure to present mitigating evidence from Terry Workman was not strategic, but unreasonable under Wiggins. Indeed, counsel has a constitutional "duty to conduct a 'diligent' investigation into his client's background" (Wiggins, 539 U.S. at ___, 123 S.Ct. at 2536), and failure to thoroughly interview a known mitigation witness to both obtain and present that witness' mitigating evidence is anything but diligent. Exactly as in Wiggins, the failure to fully investigate Terry Workman and present his mitigating evidence was "the result of inattention, not reasoned strategic judgment." Id., 539 U.S. at ___, 123 S.Ct. at 2542.

Wiggins thus establishes that, contrary to this Court's prior decision denying habeas corpus relief, counsel for Philip Workman performed deficiently, in violation of the Sixth Amendment.

---

[72] R. 94, District Court Opinion, p. 50.

[73] See Petitioner's Response To Motion For Summary Judgment, Exhibit B, Handwritten Notes from C. Glenn to Robert Jones.

[74] No mitigation interview of Terry Workman is contained in trial counsel's file. See R. 67, Petitioner's Response To Respondent's Motion For Summary Judgment, Exhibit B.

Wiggins also establishes that Philip Workman was prejudiced by counsel's performance, an issue previously pretermitted by this Court.

Under Wiggins, a petitioner raising a claim of ineffectiveness for failure to present mitigating is entitled to habeas corpus relief if "there is a reasonable probability that at least one juror would have struck a different balance" and voted for life "[h]ad the jury been able to place petitioner's excruciating life history on the mitigating side of the scale." Wiggins, 539 U.S. at ___, 123 S.Ct. at 2543. Given Philip Workman's "very compelling mitigating evidence,"(Workman v. Bell, 178 F.3d at 770) and his "tragic family background" (R. 94, District Court Opinion, p. 47), there is indeed a reasonable probability that at least one juror would have voted for life – especially where counsel offered "no . . . proof of mitigating circumstances at sentencing." Workman v. Bell, 178 F.3d at 770. With the petitioner in Wiggins having been granted habeas relief where he presented at least one mitigating factor at trial, Philip Workman makes out an even stronger case for relief, where the death sentence in his case was based on the total absence of mitigating evidence – a fact which the prosecution was quick to point out to the jury. See Workman v. Bell, 178 F.3d at 770 (prosecutor commented that Workman presented no mitigating evidence despite opportunity to do so).

In light of the Supreme Court's intervening decision in Wiggins v. Smith, this Court should grant relief from judgment under Rule 60(b). Wiggins does not create any new law but rather clarifies the proper application of Strickland v. Washington, 466 U.S. 668 (1984) to cases involving ineffective assistance of counsel in capital sentencing. See Wiggins, 539 U.S. at ___, 123 S.Ct. at 2535-2536. Because Wiggins merely clarifies pre-existing law and because Philip Workman raises no new claims and no new facts in support of his the ineffectiveness claims presented in ¶120(d) of his habeas corpus petition, Wiggins provides the precise type of intervening Supreme Court decision

which may properly serve as a basis for relief from judgment under Rule 60(b). And especially given the equitable nature of Rule 60(b), given the fact that Philip Workman will otherwise be executed if his properly presented claim is not reviewed under the standards explicated in Wiggins, this Court has both the power and the duty to grant the motion for relief from judgment, to apply Wiggins to Philip Workman's claim, and to grant Philip Workman relief.

3.
PHILIP WORKMAN IS ENTITLED TO RELIEF FROM JUDGMENT IN LIGHT OF Davis v. Mitchell, 318 F.3d 682 (6th Cir. 2003)

Philip Workman is also entitled to relief from judgment in light of the Sixth Circuit's intervening decision in Davis v. Mitchell, 318 F.3d 682 (6th Cir. 2003). Indeed, the situation here is virtually identical to Henderson v. Collins, No. C1-94-106 (S.D.Ohio Jul. 10, 2003), in which the United States District Court for the Southern District of Ohio granted 60(b) relief to a death-sentenced inmate in light of *Davis*.

In *Henderson*, the petitioner alleged in his habeas petition that the jury was misled into thinking that they were required to unanimously reject a death sentence before a life sentence could be imposed, when in fact, a life sentence would have been imposed had the jury not unanimously voted for death. Though Henderson challenged the instructions from his trial in a claim of ineffective assistance of counsel, the District Court denied habeas relief on that claim in 1999. See Henderson, slip op. at 1-2.

In 2003, however, the Sixth Circuit decided *Davis v. Mitchell*, in which the Court of Appeals held that instructions identical to those given to Henderson's jury were unconstitutional. Davis, *supra*. As the Sixth Circuit held in *Davis*, "Instructions that leave a jury with the impression that juror unanimity was required to mitigate the punishment from death to life imprisonment clearly

violate the Eighth Amendment." Davis, 318 F.3d at 685, quoted in Henderson, slip op. at 7. In light of the intervening Sixth Circuit decision in *Davis*, the United States District Court held that the intervening decision *Davis* "cast substantial doubt" on the District Court's prior judgment, since the instructions in *Davis* and *Henderson* were identical. Henderson, slip. op. at 5-7. Therefore, in light of the intervening decision in *Davis*, and "because Petitioner faces the ultimate and irreversible punishment imposed by the state," the District Court granted relief from judgment under Rule 60(b) and vacated the petitioner's death sentence. Henderson, slip op. at 7-8.

The situation here is no different. Jurors were told that they had to unanimously agree as to any life sentence. Trial Tech.R. 1190. Jurors were not instructed that they didn't need to render a unanimous verdict, nor were they informed that a failure to agree as to sentence would result in a life sentence. See Trial Tech. R. 1186-1190. Philip Workman alleged in his habeas corpus petition that these instructions and lack of instructions misled the jury and led to the unfair imposition of the death sentence. See Petition For Writ Of Habeas Corpus, ¶¶ 134(f) & (g). This Court initially denied relief, believing that jurors were not entitled to instructions that a unanimous verdict for life was not required. See R. 94, pp. 69-71 (District Court Opinion).

But as the Sixth Circuit has now held in *Davis v. Mitchell*: **"Instructions that leave a jury with the impression that juror unanimity was required to mitigate the punishment from death to life imprisonment clearly violate the Eighth Amendment**." Davis, 318 F.3d at 685 (emphasis supplied), quoted in Henderson, slip op. at 7. That is exactly what occurred here. Jurors were told that they had to be unanimous in voting for life. Jurors were unconstitutionally left with the impression "that juror unanimity was required to mitigating the punishment from death to life." Id. And, as in *Davis*, the jury was first instructed about how to impose a death sentence, after which it

received instructions as to how to impose a life sentence. Trial Tech.R. 1186-1190. This is similar to the situation in *Davis* as well. See Davis, 318 F.3d at 684-685, 690 (jury instructed to consider death first, and afterwards life; in light of lack of clarity of instructions regarding unanimity and sequence of instructions, granting habeas corpus relief). As in *Davis*, therefore, the jury verdict of death was unconstitutional.

Davis casts the correctness of this Court's judgment into grave doubt. Like the District Court judgment in *Henderson*, the District Court judgment here cannot be squared with the pronouncements of the Sixth Circuit in *Davis v. Mitchell*. Like the prior erroneous District Court judgment in *Henderson*, the prior judgment of this Court will result in the execution of a death sentence in clear conflict with the Sixth Circuit's decision in *Davis*. Consequently, exactly as in *Henderson*, given the clear legal error in this Court's prior judgment, and given that failure to grant relief will cost Philip Workman his life – despite the meritorious nature of his claim – this Court should grant the motion for relief from judgment in light of the intervening decision in *Davis*. Henderson v. Collins, No. C1-94-106 (S.D.Ohio Jul. 10, 2003).

D.
PHILIP WORKMAN IS ENTITLED TO RELIEF FROM JUDGMENT
ON HIS CLAIM THAT THE DEATH SENTENCE IS UNRELIABLE

Finally, for all the reasons previously stated in Sections II A-C of this motion, and as argued *supra*, it is apparent that this Court denied relief on Philip Workman's challenge to the unreliability of the death sentence (Petition ¶143) without critical information which has subsequently arisen after judgment, viz., proof of Harold Davis' perjury, Terry Willis' perjury, and official threats against Davis. This Court also denied relief without awareness of the Supreme Court's subsequent decision in Wiggins v. Smith, 539 U.S. ___, 123 S.Ct. 2527 (2003), and the Sixth Circuit's decision in Davis

v. Mitchell, 318 F.3d 682 (6th Cir. 2003).

Unlike when this Court initially rendered judgment, all this new information and case law calls into question the validity of this Court's prior judgment that the death sentence was reliable. The facts and law now establish that the death sentence *was*, in fact, unreliable. The death sentence was based on perjured testimony of not one – but two – witnesses. It was based upon unreasonable failures of counsel to present mitigating evidence. And it was based on instructions which misled jurors into voting for death, even if they wanted to vote for life. The new proof of perjury and intervening case law establish that Philip Workman's death sentence was unreliable, contrary to this Court's prior conclusion. In light of this new evidence and intervening case law, it is appropriate for this Court to grant the motion for relief from judgment, conduct further proceedings on Petition ¶143, and afterwards grant habeas corpus relief.

CONCLUSION

This Court should grant the motion for relief from judgment, order further proceedings (including a hearing) and grant Philip Workman habeas corpus relief.

Respectfully Submitted,

Paul R. Bottei
Christopher M. Minton

Office of the Federal Public Defender
Middle District of Tennessee
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047
FAX (615)736-5265

____

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been served via hand delivery upon counsel for Respondent, Joseph Whalen, Office of the Attorney General, 425 Fifth Avenue North, Nashville, Tennessee 37243, this ___ day of September, 2003.

____

EXHIBIT 1

EXHIBIT 2

EXHIBIT 3

EXHIBIT 4

EXHIBIT 5